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SUPREME COURT

No. 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NELSON A. ROCKEFELLER, Governor of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, MALCOLM WILSON, Lieutenant Governor of the State of New York, and ANSLEY BORKOWSKI, Clerk of the Assembly of the Legislature of the State of New York, *Appellants,*

v.

JEROME T. ORANS, THE VILLAGE INDEPENDENT DEMOCRATS, CAROL GREITZER, EDWARD I. KOCH, MARTIN BERGER and LORRAINE RICHMAN, *Appellees.*

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. .....

NELSON A. ROCKEFELLER, Governor of the State of New York, *et al.*,

Appellants,

v.

JEROME T. ORANS, *et al.*,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Appellants, on behalf of the State of New York, appeal from a final judgment of the Court of Appeals of the State of New York entered on April 28, 1965, which held valid under the United States Constitution, Section 2 of Article III of the New York State Constitution. The judgment accordingly declared the New York State Reapportionment Compliance Act (Ch. 976) as amended by Chapters 977, 978, 979 and 981 of the New York Laws of 1964 (hereinafter referred to as the reapportionment Plans) to be in conflict with such provision of the State Constitution. This statement is submitted to show that this Court has jurisdiction of the appeal and that substantial questions are presented under the Constitution of the United States.

OPINIONS BELOW

The opinion of the New York Court of Appeals is reported in 15 N. Y. 2d 339. A copy of the opinion and final judgment ("remittitur") are appended hereto as Appendix A. The opinion of the Supreme Court of the State of New York, County of New York, is reported in 45 Misc. 2d 616.

JURISDICTION

This suit was brought by appellees in the Supreme Court of New York, New York County, to invalidate the reapportionment Plans. The judgment of that court declaring the Plans invalid was affirmed by the New York Court of Appeals on April 14, 1965, and final judgment was entered on April 28, 1965. A Notice of Appeal was filed in the Supreme Court of New York, New York County, on May 5, 1965.

The jurisdiction of this Court is conferred by 28 U. S. C. § 1257(2), since there is drawn in question the validity of a provision of the New York State Constitution under the Fourteenth Amendment to the United States Constitution, and the decision below was in favor of its validity. The following decision sustains the jurisdiction of the Court to review the final judgment in this case: *Maryland Committee for Fair Representation* v. *Tawes,* 377 U. S. 656 (1964).

CONSTITUTIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States and the pertinent provisions of Article III of the Constitution of the State of New York are appended hereto as Appendix B. The New York State Reapportionment Compliance Act (Ch. 976) as amended by Chapters 977, 978, 979 and 981 of the New York Laws of 1964, which is very lengthy, is not included herewith by leave of the Clerk of this Court, but is set forth in Appendix D to

the Jurisdictional Statement in *Lomenzo* v. *WMCA, Inc.*, October Term, 1965, No. 85, filed on April 23, 1965.

QUESTIONS PRESENTED

1. Where the scheme of legislative apportionment contained in the New York Constitution violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, does the provision of that scheme fixing the size of the New York State Assembly at 150 members violate the Constitution of the United States?

2. Where this Court held, in *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633, 654, that:

> "With the size of the Assembly fixed at 150, with a substantial number of Assembly seats distributed to sparsely populated counties without regard to population, and with an additional seat given to counties having 1½ population ratios, the population-variance ratios between the more populous and the less populous counties will continually increase so long as population growth proceeds at a disparate rate in various areas of the State. . . . [W]hen the effect of these provisions, and the statutes implementing them, on the right to vote of those individuals living in the disfavored areas of the State is considered, we conclude that neither the existing scheme nor the forthcoming one [under the 1960 census] can be constitutionally condoned."

did the New York Court of Appeals err in upholding the validity, under the Constitution of the United States, of the provision of the New York Constitution which fixed the size of the New York Assembly at 150 members, and

in declaring that provision operative so as to invalidate stop-gap reapportionment Plans which create an Assembly of more than 150 members?

3. Where this Court in *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633, held that the provisions in the New York State Constitution requiring separate county representation in the State Assembly, and fixing the size of the Assembly at 150 members, could not both coexist under the Equal Protection Clause, did the New York Court of Appeals err in construing that decision as striking down only the provision requiring separate county representation, and as leaving the State Legislature bound by the provision fixing the size of the Assembly, rather than permitting the Legislature, in fashioning stop-gap reapportionment, to determine the extent to which these provisions should yield to the Equal Protection Clause?

STATEMENT

The Legislature of the State of New York, in reapportioning pursuant to Federal court order, was bound to disregard at least one provision of the prior invalid scheme of legislative apportionment in order to comply with the one-man, one-vote requirement laid down by this Court in *Reynolds* v. *Sims*, 377 U. S. 533, and *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633. It accordingly disregarded the provision of the State constitutional apportionment scheme which fixed the size of the Assembly at 150 members. The decision of the New York Court of Appeals which used that provision to invalidate the reapportionment Plans presents important questions as to the proper implementation of reapportionment responsibilities in our Federal system. The constitutionality of that decision is at issue on this appeal.

(a) *Prior Federal Court Proceedings.* Following three years of litigation, this Court on June 15, 1964 held that

the scheme of apportionment embodied in the New York Constitution violated the Equal Protection Clause. *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633.

The United States District Court for the Southern District of New York, on remand from that decision, ordered on July 27, 1964 that the 1964 election be held under the invalidated apportionment scheme, provided that the Legislature should enact a valid reapportionment plan by April 1, 1965 (later extended to May 5, 1965). Governor Rockefeller announced the appointment of a bi-partisan Citizens' Committee on Reapportionment and represented to the District Court under oath that he would reconvene the Legislature in special session to act on the report of this Committee as soon as it should be submitted. Upon receiving the Committee's report on December 1, 1964 Governor Rockefeller promptly convened a special session of the Legislature, which enacted the four reapportionment Plans (Plans A, B, C and D).

The Citizens' Committee in its report recommended that the only way to comply promptly with the District Court's order was by a statutory enactment, since an amendment to the State Constitution would take at least two years and ought prudently to await further determination by this Court as to the proper scope of constitutional reapportionment. The Committee recommended the adoption of a permanent apportionment by way of a State constitutional convention. The reapportionment Plans therefore were to serve as interim measures.

An increase in the number of Assemblymen was recommended to the Legislature by the Citizens' Committee on Reapportionment. It concluded that the Legislature could disregard the 150-member limitation since the *WMCA* decision had proscribed the use of such limitation when combined with separate county representation. The Committee stated, at p. 22:

> "If a departure from the numbers prescribed in the Constitution of 1894 will more reasonably and practically permit a full compliance with the equal population mandate of the Supreme Court in 1964, it should be unassailable at the state level today.
>
> "There is good reason to argue that the present numerical limitations have fallen together with the basic apportionment formulae."

The Citizens' Committee concluded that the provision for separate county representation was more vital to the proper working of State government than the 150-member limitation.

The Legislature, in enacting the reapportionment Plans, accordingly determined to disregard the 150-member limitation in order to continue to the extent possible, in a manner consistent with equal protection requirements, the historic State policy to provide separate county representation in one house of the Legislature.

The reapportionment Plans were challenged in a proceeding brought in the United States District Court for the Southern District of New York. By orders of January 26, 1965 and February 16, 1965 and a decision dated February 1, 1965, the District Court held that one of the Plans (Plan A) fulfills the requirements of the Federal Constitution, but it invalidated the other three (Plans B, C and D) under the Equal Protection Clause of the Fourteenth Amendment. 238 F. Supp. 916. Certain of the defendants in that action filed a Jurisdictional Statement in this Court on April 23, 1965 (October Term, 1965, No. 85), appealing from so much of the District Court's orders as invalidated Plans B, C and D. Plaintiffs and others in that action filed a Joint Jurisdictional Statement on April 26, 1965 (October Term, 1964, No. 1104), appealing from so much of the District Court's orders as upheld Plan A.

A fuller account of the prior Federal court proceedings is contained in the Jurisdictional Statement in *Lomenzo*, v. *WMCA, Inc.*, (October Term, 1965, No. 85), at pp. 4-11, filed on April 23, 1965.

(b) *Proceedings Below.* On January 20, 1965 proceedings were brought in the Supreme Court of the State of New York, New York County, to invalidate the reapportionment Plans. By stipulation the proceedings were limited to a review of Plan A, the Plan upheld by the Federal court, except that the State court was requested to determine any common questions of law applicable to all of the Plans. The court held on March 15, 1965 that the provision of Section 2 of Article III of the New York State Constitution limiting the size of the Assembly to 150 members is still operative, notwithstanding this Court's decision in *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633, invalidating the prior apportionment scheme, of which Section 2 was a part. Accordingly, the State Supreme Court invalidated all of the reapportionment Plans because they established an Assembly of more than 150 members.

On April 14, 1965, on direct appeal, the New York Court of Appeals affirmed the decision of the State Supreme Court. 15 N. Y. 2d 339. The Court of Appeals ruled specifically that the 150-member limitation in the State Constitution did not violate the United States Constitution, was not affected by this Court's decision in *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633, and was therefore binding on the Legislature when it adopted the stop-gap reapportionment Plans.

THE QUESTIONS ARE SUBSTANTIAL

This appeal is taken under 28 U. S. C. § 1257(2) from a final judgment of the highest court of New York,

where there is drawn in question the validity of a provision of the New York Constitution on the ground of its repugnance to the Fourteenth Amendment to the United States Constitution, and where the decision below was in favor of its validity. The Court recently noted probable jurisdiction of, and gave plenary consideration to, an appeal from a State court judgment upholding the validity, under the Equal Protection Clause, of apportionment provisions contained in the Constitution of that State. *Maryland Committee* v. *Tawes,* 374 U. S. 804 (1963), 377 U. S. 656 (1964).

The Federal constitutional question was timely raised in the court of first instance, and was raised again on the appeal to the New York Court of Appeals, which affirmed the decision of the lower court. The Court of Appeals stated the precise question before it to be:

> "are any of the provisions of article III of our State Constitution, in addition to those directly passed on by the Federal courts in the *WMCA* case, in 'unavoidable conflict with the Fourteenth Amendment' (equal protection clause) of the Federal Constitution?" 15 N.Y. 2d at 349.

The ruling on this question was necessary to the decision invalidating the Plans. Thus, there was no independent State ground upon which the decision rested, and this Court's jurisdiction is properly invoked.

The 150-member limitation on the size of the Assembly was an integral part of the prior apportionment scheme invalidated by this Court in the *WMCA* case. The Court there held that the 150-member limitation could not, consistent with the Equal Protection Clause, co-exist with the State constitutional provision for separate county representation in the Assembly. As indicated below, the Court

did not say that only one of these provisions was invalid, or specify which one. Rather it invalidated the scheme that contained them both.

The Court included the 150-member limitation in its description of the gravamen of the complaint. 377 U. S. at 636. The Court referred repeatedly to the 150-member limitation in describing the apportionment formula contained in sections 2, 3, 4 and 5 of Article III. In reaching its decision, the Court expressly condemned the 150-member limitation as part of the invalid prior apportionment scheme, stating:

> *"With the size of the Assembly fixed at 150,* with a substantial number of Assembly seats distributed to sparsely populated counties without regard to population, and with an additional seat given to counties having 1½ population ratios, the population-variance ratios between the more populous and the less populous counties will continually increase so long as population growth proceeds at a disparate rate in various areas of the State. . . . [W]hen the effect of *these provisions,* and the statutes implementing them, on the right to vote of those individuals living in the disfavored areas of the State is considered, we conclude that neither the existing scheme nor the forthcoming one [under the 1960 census] can be constitutionally condoned." 377 U. S. at 654. (Emphasis supplied.)

The Court of Appeals stated that this language was merely a "passing reference" by this Court to the 150-member limitation, and it did not construe this "passing reference" as a holding that the 150-member limitation fell as a part of the prior New York apportionment scheme. The State court, in holding the 150-member provision operative,

stated that this Court never "said or suggested that the 150-member Assembly limitation was unconstitutional or even involved in the Federal constitutional problems solved in the *WMCA* case. . . ." 15 N. Y. 2d at 346.* The State court's ruling thus clearly misconstrued the effect of the *WMCA* decision.**

The State court erroneously concluded that this Court invalidated the prior New York apportionment scheme on the basis of "the complicated formula provided in Sections 3, 4, and 5 of Article III." In fact, this Court explicitly decided the *WMCA* case on the basis of Sections *2* (the 150-member provision), 3, 4 and 5 of Article III. 377 U. S. at 636, 641, 645-647, 654.

This Court clearly held in *WMCA* that under an apportionment scheme that fixed the size of the Assembly at 150

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*Dissenting from the decision of the Court of Appeals, Judge Van Voorhis stated:

"It seems to me to be too clear for argument that an 'Assembly' consisting of 150 members was an inseparable part of the 'scheme of legislative apportionment' which was . . . struck down.

* * *

"This is the formula which the Supreme Court struck down, and the root of the formula is the ratio of apportionment which is the quotient obtained by dividing the citizen inhabitants of the State by 150. The number 150 is, therefore, the heart of the 'scheme of legislative apportionment' which the Supreme Court declared to be unconstitutional. It would be playing fast and loose with the facts to assume that the number of 150 was arrived at independently of the formula in order to fix the numerical membership of the Assembly without regard to how they were to be distributed between up-State and down-State or among the more populous and less populous counties." 15 N. Y. 2d at 356-357.

**The State court likewise misconstrued the decision of the District Court on remand in the *WMCA* case; it attributed to the District Court a holding that the *WMCA* decision did not affect the 150-member provision. *In fact, the plaintiffs in the District Court conceded that the 150-member provision had been invalidated by this Court* and the District Court therefore did not pass on the question of the continuing validity of the 150-member provision. 238 F. Supp. at 921 (S. D. N. Y. 1965).

members, the disparity between urban and rural representation caused by the provision for separate county representation would increase so long as the population growth proceeded at different rates in different areas of the State. It was the express holding of this Court that the 150-member limitation and the provision for separate county representation could not constitutionally co-exist under the Equal Protection Clause. This Court did not, as the State court concluded, strike down the provision for separate county representation and leave standing the restriction on the size of the Assembly. Rather this Court held that the two provisions in combination violated the Equal Protection Clause.

In reaching its decision, the State court twice (15 N. Y. 2d at 346-348) quoted this Court's statement in *Reynolds* v. *Sims*, 377 U. S. at 584, that:

> "state constitutional provisions should be deemed violative of the Federal Constitution only when validly asserted constitutional rights could not otherwise be protected and effectuated. Clearly, courts should attempt to accommodate the relief ordered to the apportionment provisions of state constitutions insofar as is possible."

This Court continued, however, *ibid.*:

> "But it is also quite clear that a state legislative apportionment scheme is no less violative of the Federal Constitution when it is based on state constitutional provisions which have been consistently complied with than when resulting from a noncompliance with state constitutional requirements. When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls."

The Court thus made it clear that when an apportionment scheme, considered in its entirety, violates the Federal Constitution, the scheme is equally invalid whether it happens to be embodied in statute or in State constitutional provisions. The Court did not carve out a special exception for State constitutional schemes, nor did it hold that the anachronistic fragments of such a scheme were entitled to any greater consideration than the fragments of a statutory scheme.

The State court concluded that:

> "The only other justification for excising the 150-member constitutional provision [besides a showing that it was not severable from the prior apportionment scheme] would be a showing that the Supreme Court's mandate for equally populated districts could not be obeyed if the Assembly districts numbered exactly 150." 15 N.Y. 2d at 350.

With respect to another provision of the prior scheme, the State court similarly stated that it should

> "be respected if it be mathematically possible to do so and still obey the 'one man, one vote' basic rule" 15 N.Y. 2d at 351.

Yet clearly the application of such a "mathematically possible" test to determine whether provisions of an invalid scheme remain operative is bound to defeat Legislative efforts at a rational reapportionment which is consistent with legitimate State policies and equal protection requirements. The controlling principle in reapportionment should be the formulation of a cohesive plan rationally designed in light of the current problems and policies of the State, and consistent with the one-man, one-vote principle. It should not be a blind adherence to such remnants of an invalid scheme as might be resurrected by a slide rule.

This Court indicated the appropriate scope of State legislative power to reapportion when it stated in *Maryland Committee* v. *Tawes*, 377 U. S. at 675-676:

> "With the Maryland constitutional provisions relating to legislative apportionment hereby held unconstitutional, the Maryland Legislature presumably has the inherent power to enact at least temporary reapportionment legislation pending adoption of state constitutional provisions relating to legislative apportionment which comport with federal constitutional requirements."

Similarly, in *Roman* v. *Sincock*, 377 U. S. 695, 710-712 (1964), this Court held that regardless of the fact that apportionment has traditionally been considered a constitutional matter in Delaware, the Delaware Legislature might adopt a scheme of reapportionment.

As this Court stated, in *Reynolds* v. *Sims*, 377 U. S. at 586, "legislative reapportionment is primarily a matter for legislative consideration and determination." It would contravene this principle to permit State courts to resurrect incomplete portions of an invalid apportionment scheme—which were originally adopted as a part of, and in light of, the entire scheme—so as to constrict State legislatures in the fulfillment of their reapportionment obligations.

Article III, Section 5 of the New York Constitution requires that every county (except Hamilton) shall be represented in the Assembly by at least one Assemblyman. Separate county representation has traditionally been of great importance to the people of New York State. The county is the basic governmental unit, providing a host of governmental services to its citizens.* The interests of these counties are diverse and distinct and have his-

*These activities include such extensive and important public functions as police protection, prosecution of crime, legal assistance to indigents accused of crime, courts of law, water supply, sewage and

torically been deemed to merit separate representation in the State Legislature.** Accordingly, the Legislature sought in the reapportionment Plans to achieve separate county representation, consistent with the one-man, one-vote principle and the purpose of keeping the Assembly within a manageable size. Resurrection of the 150-member limitation on the Assembly unnecessarily impedes this legitimate State policy and improperly fetters the Legislature in its efforts to reapportion in accordance with the Federal Constitution.

The questions raised by this appeal are of unusual public importance. The reapportionment decisions of the Court have created the necessity for almost all of the States to reapportion their legislatures. It is important that State legislatures know as promptly and authoritatively as possible the limitations governing their reapportionment responsibilities. State and Federal courts likewise are in need of authoritative interpretation, so as to avoid conflicting decisions and further years of confusion and uncertainty, in matters that lie at the core of State government.

Specifically, the State court's invalidation of the New York reapportionment legislation poses vital questions both as to the intent of this Court's *WMCA* decision and the scope of legislative discretion to enact reapportionment legislation in compliance with Federal court orders. It is im-

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drainage facilities, watershed protection, county planning, public health services, hospitals, libraries and museums, community colleges, transportation facilities, public assistance and care, youth and veterans services, housing regulation, conservation, parks and recreation, highways, probation services, civil service, fire training and mutual aid, civil defense and election procedures. The Citizens' Committee on Reapportionment noted in its Report that each of these functions brings the counties into direct contact with the Legislature.

**As this Court recognized in *Reynolds* v. *Sims*, 377 U. S. at 578:

"A State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible . . . in designing a legislative apportionment scheme. Valid considerations may underlie such aims."

See also 377 U. S. at 580.

portant to reapportionment everywhere that the Court make clear the extent to which legislatures are to be circumscribed by archaic fragments of prior apportionment schemes when they undertake their difficult reapportionment responsibilities.

The scope of permissible flexibility in devising interim reapportionment measures was indicated by the Court on a prior appeal. The District Court in the *WMCA* case ordered a one-year term for legislators elected in 1964 and 1965, even though Article III of the State Constitution requires two-year terms for legislators, a provision that clearly was not part of the invalidated apportionment scheme. This Court, in summarily affirming the District Court's order, appears to have sanctioned the District Court's right to disregard State constitutional provisions when faced with the need to provide an opportunity to enact a stop-gap plan consistent with equal protection requirements. *Hughes* v. *WMCA, Inc.*, 379 U. S. 694 (1965).

The decisions of this Court and the necessities of rational reapportionment require that State legislatures be permitted to carry out the reapportionment responsibilities conferred by the Federal courts, free of restrictions contained in previously invalidated apportionment schemes. Otherwise years of uncertainty will be inevitable, and reapportionment responsibilities may be thrown on the Federal courts rather than on the legislatures where they properly belong.

Permitting the resurrection of part of an invalid apportionment scheme invites a head-on collision between State and Federal courts. In this case the State court invalidated Plan A on the basis of the 150-member limitation. On May 24, 1965 the District Court, faced with State court invalidation of the only Plan held to comply with the Federal Constitution, ordered that the 1965 election be held under Plan A as a stop-gap measure. On June 28, 1965 a proceeding was commenced in the State Supreme Court,

Albany County, to enjoin the New York Secretary of State from complying with the District Court's order to hold the 1965 election under Plan A. *Glinski* v. *Lomenzo,* Sp. T. Calendar No. 36. Collisions such as these are seriously injurious to our Federal system and paralyzing to the processes of State government.

CONCLUSION

The New York Legislature has implemented orders of the Federal court by enacting reapportionment legislation which complies fully with Federal constitutional requirements, and at the same time carries on rational and important State policies. The New York Court of Appeals erroneously invalidated this legislation on the basis of a provision of the prior apportionment scheme struck down by this Court in the *WMCA* case.

The Court has jurisdiction of this appeal. The questions presented are substantial and of unusual public importance. Probable jurisdiction should be noted and the final judgment below from which this appeal is taken should be reversed.

Respectfully submitted,

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July 2, 1965

Appendices
A and B

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APPENDIX A

Opinion of the Court of Appeals of the State of New York Dated April 14, 1965

In the Matter of

JEROME T. ORANS, Respondent-Appellant.

In the Matter of

VILLAGE INDEPENDENT DEMOCRATS et al., Respondents.

Argued March 30, 1965; decided April 14, 1965.

OPINION PER CHIEF JUDGE DESMOND

Chief Judge DESMOND. These are proceedings brought by citizens pursuant to section 1 of chapter 773 of the Laws of 1911 to review five statutes (L. 1964, chs. 976, 977, 978, 979, 981) enacted at an extraordinary session of the Legislature held in December, 1964, and which set up four separate plans for apportioning and districting the State Senate and Assembly. The petitions list numerous alleged illegalities in various provisions of the challenged 1964 statutes including an assertion that such laws cannot be passed at a special session and an assertion that each of the four plans violates the State Constitution in that each establishes an Assembly of more than 150 members whereas the State Constitution in section 2 of article III says: "The assembly shall consist of one hundred and fifty members."

After a trial at Supreme Court, Special Term, the court in an opinion and order which discussed many other issues posed by the parties declared the five statutes and their four constituent apportionment-districting plans to be unconsti-

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tutional in their entirety but on one ground only, viz., that each plan calls for an Assembly of more than 150 members prescribed by section 2 of article III of the New York State Constitution. The court held that nothing in earlier Federal court decisions hereafter referred to affects or abolishes the command of section 2 of article III of the State Constitution that there be a 150-member Assembly and that the 150-Assemblymen requirement remains valid, subsisting and effective. Other points argued by the parties were treated in the court's opinion and order but the only two real holdings were: first, that it was not illegal for the Legislature to deal with such matters at an extraordinary or special session; and, second, that the numbers of Assemblymen (variously 165, 180, 186 and 174) specified in the four challenged plans, being in excess of 150, conflicted with the Constitution so that the statutes were completely invalid, regardless of other attacks.

These same two questions are before us on these appeals (the appeal of respondent State officers is as to the second holding, petitioner's cross appeal is as to the first). Since the appeal presents only questions as to the constitutional validity of statutes, it comes direct to us and not to the Appellate Division (N. Y. Const., Art. VI, § 3, subd. b, par. [2]; CPLR 5601).

We hold to be in full effect the flat, positive and unmistakable command of the State Constitution that there be 150 members of the State Assembly. Since each of the four plans violates that command, each plan and all five statutes are invalid. It follows, as we shall explain later on in this opinion, that it is up to the Legislature now to enact

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a new districting-apportionment statute. As soon as reasonably possible thereafter, a Constitutional Convention should be called into being.

A brief description of the extensive and complicated litigations which bring us to the present impasse will now be attempted. In March, 1962 (the Tennessee case, *Baker* v. *Carr,* 369 U. S. 186) the United States Supreme Court held that the Federal courts have subject-matter jurisdiction as to a lawsuit brought to assert that a State legislative representation statute denies the right of citizens to equal protection of the laws, and that a qualified voter has standing to maintain such a suit. Such a suit (entitled *W. M. C. A.* v. *Simon*) had been brought in the Federal court to obtain a judgment that New York's apportionment laws violated the Federal Constitution and had been dismissed for nonjusticiability by a three-Judge District Court (202 F. Supp. 741), but the Supreme Court (*W. M. C. A.* v. *Simon,* 370 U. S. 190 [June, 1962]) vacated the dismissal and remanded the case to the District Court for further consideration "in the light of *Baker* v. *Carr*". On remand the three-Judge Federal District Court held that the New York State's then apportionment laws were valid (*W. M. C. A.* v. *Simon,* 208 F. Supp. 368). The decision was appealed and the victory was short-lived. On June 15, 1964 there were handed down the Supreme Court's series of State apportionment decisions, beginning with the master case of *Reynolds* v. *Sims* (377 U. S. 533) and including the *WMCA* case, now entitled *WMCA* v. *Lomenzo* (377 U. S. 633). The Supreme Court applied to New York its rule, announced on the same day in *Reynolds* v. *Sims,* that both houses of a bicameral Legislature must under the Four-

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teenth Amendment's guarantee of equal protection of the laws be apportioned substantially on an equal population basis. Examining the complicated formula provided in sections 3, 4 and 5 of article III of New York's Constitution, and the statistics as to population and vote in the New York State Senate and Assembly districts, the highest court decided that the existing apportionment (under 1950 census figures) is, and any reapportionment applying to the formulae to 1960 census returns would be, so unequal as to Assembly and Senate district populations as not to be constitutionally sustainable, and that the formulae in the State Constitution necessarily resulted in gross disparities, with comparatively less representation for the populous counties and favoritism to the less populous counties. The Supreme Court, therefore, again remanded the *WMCA* case to the District Court for further proceedings consistent with the Supreme Court's opinion in the *WMCA* and *Reynolds* v. *Sims* litigations.

The Supreme Court's second *WMCA* opinion ended with this paragraph: "We find it inappropriate to discuss questions relating to remedies at the present time, beyond what we said in our opinion in *Reynolds*. Since all members of both houses of the New York Legislature will be elected in November 1964, the court below, acting under equitable principles, must now determine whether, because of the imminence of that election and in order to give the New York Legislature an opportunity to fashion a constitutionally valid legislative apportionment plan, it would be desirable to permit the 1964 election of legislators to be conducted pursuant to the existing provisions, or whether under the circumstances the effectuation of appellants' right to a

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properly weighted voice in the election of state legislators should not be delayed beyond the 1964 election. We therefore reverse the decision below and remand the case to the District Court for further proceedings consistent with the views stated here and in our opinion in *Reynolds* v. *Sims.*"

We emphasize at this point that neither the Supreme Court nor the District Court ever said or suggested that the 150-member Assembly limitation was unconstitutional or even involved in the Federal constitutional problems solved in the *WMCA* case, and that, absent such a holding of Federal unconstitutionality, the limitation remains intact. In its opinion in the master case of *Reynolds* v. *Sims* (377 U. S. 533, *supra*), the Supreme Court had said (p. 584): "State constitutional provisions should be deemed violative of the Federal Constitution only when validly asserted constitutional rights could not otherwise be protected and effectuated. Clearly, courts should attempt to accommodate the relief ordered to the apportionment provisions of state constitutions insofar as is possible." More specifically in *Reynolds* v. *Sims* (p. 581, n. 63) the high court wrote this: "Determining the size of its legislative bodies is of course a matter within the discretion of each individual State. Nothing in this opinion should be read as indicating that there are any federal constitutional maximums or minimums on the size of state legislative bodies." True it is that in describing the New York legislative malapportionment the Supreme Court (*WMCA* v. *Lomenzo,* 377 U. S. 633, 654, *supra*) used this language: "With the size of the Assembly fixed at 150, with a substantial number of Assembly seats distributed to sparsely populated counties". Appel-

lants would have us read this as a holding by the Supreme Court that the 150 figure is so much and so integral a part of the total New York apportionment scheme that the numerical fixation for Assembly membership falls with the rest. We do not so construe that passing reference in the court's description of the State plan. Nor did the Federal District Court so read it when (as hereafter described) the *WMCA* case came to it for the third time. The three-Judge court wrote this (238 F. Supp. 916): "In short, as far as the Federal Constitution is concerned, all the provisions of Article III of the State Constitution relied on by plaintiffs are still operative. Moreover, these provisions are limited in their application only to the extent that they are in unavoidable conflict with the decision of the Supreme Court in *WMCA, Inc.* v. *Lomenzo, supra,* or with the July 27, 1964 order of this court. If, as the State suggests, these provisions of Article III are inseparably intertwined with the 'constitutional formulas' condemned by the Supreme Court, so that all must fall together, this would be a consequence of state law rather than federal law", and quoted this from *Reynolds* v. *Sims*: "State constitutional provisions should be deemed violative of the Federal Constitution only when validly asserted constitutional rights could not otherwise be protected and effectuated. Clearly, courts should attempt to accommodate the relief ordered to the apportionment provisions of state constitutions insofar as is possible" (377 U. S., p. 584). Surely this concept permits and requires the preservation of the "150 assemblymen" provisions voted into our State Constitution by the people of this State.

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Summing up as to the impact on New York apportionment of *Reynolds* v. *Sims* and *WMCA* v. *Simon* (*Lomenzo*), we say that the Federal tribunals invalidated New York's legislative apportionment laws because of these factors only: the distribution to underpopulated counties of a large number of Assembly seats without regard to population, plus the ratios provided for Senate seats, both producing the result that neither House was apportioned so as to result in a "one man, one vote" districting.

We return to the *WMCA* case and its third appearance before the Federal District Court. The court directed that the Legislature enact before April 1, 1965 (since extended to May 5, 1965) a valid apportionment scheme. Then followed the New York Legislature's special session of 1964 and its enactments. The several statutes passed by the Legislature at the special session and signed by the Governor (each law amending the one enacted before it and each violating the 150-member Assembly provision) embodied four different plans now called, for convenience and in order of enactment, A, B, C and D. Plan D, passed last and so being the one favored by the Legislature, was taken up first by the Federal District Court when it got the *WMCA* case back before it. None of the four plans were found to violate the canon: "one man, one vote", But plans D, C and B were all invalidated by the District Court on these grounds: plan D is unconstitutional because it used 1962 voter figures instead of population figures and also because it provided for fractional voting by legislators; plan C because of fractional voting provisions; and plan B because it used voter figures instead of population. This left for consideration by the three-Judge court plan A

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which is the one contested in the present suit and which does not offend in either of the ways that B, C and D do but which does violate the 150-member Assembly provision of section 2 of article III of the State Constitution. The Federal District Court declined to pass on any of the remaining objections stated as to plan A in the *WMCA* case, holding in effect that these were for the State courts to pass on. This the Federal District Court emphasized when it wrote in its order of February 16, 1965: "1. Article III of the New York State Constitution is invalid under Amendment XIV of the United States Constitution only to the extent that its provisions are in unavoidable conflict with the decisions of the United States Supreme Court in *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633 (1964) and with the order of this court dated July 27, 1964."

There was left then for the New York State courts in the present proceedings this question: are any of the provisions of article III of our State Constitution, in addition to those directly passed on by the Federal courts in the *WMCA* case, in "unavoidable conflict with the Fourteenth Amendment" (equal protection clause) of the Federal Constitution? More specifically and pointedly the question is: how much of article III necessarily falls? No one doubts that, absent "unavoidable conflict" with Federal constitutional law as expressed in *Reynolds* v. *Sims* and *WMCA* v. *Simon*, our article III as enacted by the people of New York State not only subsists but is controlling on the Legislature in passing any reapportionment redistricting laws.

We have already stated our conclusion that nothing in the Federal (*WMCA*) decisions abolishes the 150-member

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provision of our State Constitution. Therefore, we should consider it our duty to save it as a clearly separate and severable item (see *People ex rel. Alpha Portland Cement Co.* v. *Knapp*, 230 N. Y. 48, 60-63). "Our right to destroy is bounded by the limits of necessity. Our duty is to save unless in saving we pervert." That striking language of Judge CARDOZO's *Alpha Cement* opinion is surely no less applicable to a Constitution than to a simple statute. Of course, if the 150 limitation were an inseparable part of the larger plan, it could not be saved, but there is no real evidence that it was. Each of our State Constitutions including the first (1777) has prescribed the number of Assemblymen. An 1801 New York constitutional amendment fixed Assembly membership at 100 but ordered that such membership be increased by two each year until a total membership of 150 be reached. Such was the origin of the 150 figure which was, however, not actually arrived at until the Constitution of 1894. From the 1821 Constitution until that of 1894 the number of Assembly members had remained at a constant 128. It was the 1894 Constitution which contained for the first time the elaborate and complex formulae which the Supreme Court struck down as calculated to effect, and effecting, discrimination. Isolated floor speeches and committee reports excerpted from the minutes of the 1894 Convention do not prove that the increase to 150 Assemblymen was directly related to anything other than the increase in the State's population or that it was so central to the formulae as to be inseparable from them. The 150-member provision is stated separately and must be treated separately.

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The only other justification for excising the 150-member constitutional provision would be a showing that the Supreme Court's mandate for equally populated districts could not be obeyed if the Assembly districts numbered exactly 150. No such showing is made or can be made. Difficulties there will be as we will mention later in another connection but there is no impossibility.

We could put a period to this opinion at this point but we are aware that an affirmance here produces pressing necessity for new legislation. The court should not refrain from giving such guidance as is appropriate for the enactment of a new apportionment-districting act.

The first of the additional questions to be considered arises from the objection that the 1964 statutes were invalid because passed not at a regular session but at a special session of the Legislature. Special Term in the decision here appealed from ruled that passage of such legislation at a special session was not forbidden. We agree. In article III, sections 4 and 5 do in terms require reapportionment at a "regular session" but in the only decision of this court on the point we said that the reference to a regular session merely fixed the time and did not limit the power of the Legislature (*Matter of Reynolds*, 202 N. Y. 430, 443-444). Also, it is useful to note that the 1953 reapportionment (the most recent except for that of 1964) was voted at a special session. The 1953 apportionment was upheld in *Matter of Richardson* (*Stark*) (307 N. Y. 269) and, since no point was made of its having been passed at a special session, it would appear that counsel and the courts assumed that invalidity did not result from that circumstance.

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What other parts, if any, of sections 3, 4 and 5 of article III remain binding? First taking up section 5, the unconstitutionality found by the United States Supreme Court relates almost entirely to the second paragraph of that section and to the provision in the first paragraph that each county no matter how small shall have an Assembly member. We see no reason why the balance of section 5 should not be obeyed, especially its requirement that Assembly districts be "compact * * * convenient and contiguous", and including so far as possible all the other directions in the fourth paragraph of section 5. Section 3 of article III of the Constitution, insofar as it delimits the Senate districts, is completely void. Of course, also, the apportionment and locating of Senate districts by the 1964 statutes fall with the invalidated Assembly districting in the same 1964 statutes since the Constitution (art. III, § 5) says that the apportionment of Assembly districts and Senate districts must be "by the same law". The third paragraph of section 4 which permits the increase of State Senate districts above 50 is still alive (see *Matter of Fay*, 291 N. Y. 198) except, of course, that it too is subject to the requirement that districts must be substantially equal in population. The long full paragraph at the beginning seems still to be applicable except possibly the prohibitions in its last two sentences which should, however, be respected if it be mathematically possible so to do and still obey the "one man, one vote" basic rule.

The districting outlawed by the United States Supreme Court as well as all former districtings of this State use the county as the basic unit into which both Assembly and

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Senate districts are molded, but it is patent that under the new rules the integrity of all the counties in these respects cannot be complete. This means not only that it will be impossible to give each county at least one full Assembly district but also that the boundaries of districts cannot in all instances be co-terminal with county borders. Also, the fourth paragraph of section 5 of article III giving local legislatures the power to draw Assembly district lines in counties having more than one Assembly district must go by the board, since in some instances part of an Assembly district will have to be in one county and part in another. However, the historic and traditional significance of counties in the districting process should be continued where and as far as possible.

As to the suggestion that we should leave redistricting to the Federal courts, a large part of the answer is in section 1 of article III of the State Constitution which says: "The legislative power of this state shall be vested in the senate and assembly" and in the directives found in sections 4 and 5 of article III. There is no doubt that reapportionment is within the legislative power with the exercise thereof being subject to constitutional regulation and limitation (see *Matter of Sherrill* v. *O'Brien*, 188 N. Y. 185, 195, as confirmed in *People ex rel. Simon* v. *Bradley*, 207 N. Y. 592, 610). In *Reynolds* v. *Sims* (377 U. S. 533, 586, *supra*) the Supreme Court said that "legislative reapportionment is primarily a matter for legislative consideration and determination, and * * * judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do

so." That says two things: that the power to apportion is generally legislative, and, second, that the Federal courts intervene only out of necessity—that is, when a State apportionment has been held federally unconstitutional and the State Legislature has failed to pass a valid apportionment. That must necessarily mean not that the Federal courts are to do the apportioning when the State apportionment violates the Federal Constitution but that the Legislature is under an obligation to reapportion and that the Federal courts move in only as a last resort.

In saving as much as possible of our article III we are not thwarting but carrying out the will of the people of this State. To turn the whole thing over to the Federal courts would be abdication of the State's sovereignty. To say that apportionment must wait until a constitutional amendment be passed would mean that in the considerable intervening time there would be no apportionment law at all in the State. Since the Federal courts have already held that the present legislators came into office last year pursuant to a districting which was constitutionally void, the result might be not only that the State would have no apportionment law at all but that we might have no Legislature since the three-man Federal court has ruled that the present Legislature is only being allowed to sit on condition that *it* promptly pass a new apportionment statute. The courts of this State and especially our court are part of the government of the State and we have our own obligation to do what we can to keep in existence the necessary elements of State government.

An elaborate formula for allocation of Assembly and Senate seats (such as that of 1894) is not an inseparable

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part of our State Constitution. The very first (1777) Constitution fixed the minimum number of Assemblymen, provided that they were to be chosen annually by counties and allocated the number of Assemblymen for each of the 14 then existing counties (art. IV). The same Constitution said that seven years after the end of the Revolutionary War a census should be taken and that, if the 1777 apportionment of Assemblymen was found to be not in proportion to the number of electors in each county, the legislators should make such an apportionment according to the number of electors in each county, and similarly every seven years thereafter. Likewise, in article XII of the 1777 Constitution, four Senate districts were formed each comprising several counties and a certain number of Senators was assigned to each district with similar provisions for reapportioning according to the number of electors every seven years. These were the apportionment provisions of the 1777 Constitution. Similarly, the Constitutions of 1821 and 1846 simply provided for a division of the State into a fixed number of Assembly and Senate districts and an assignment of numbers of members in proportion to the number of electors. Thus, for the first century and more of the State's existence we had in effect a "one man, one vote" policy of apportionment and it was not until 1894 that the Constitution set up the discriminatory formulae now invalidated by the United States Supreme Court.

The Special Term opinion and order listed a number of Assembly and Senate districts as to each of which, so the court thought, there was a prima facie showing of failure to comply with subsisting provisions of article III. The court stated also that issues of fact had been raised as to

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what the court called "the use of the gerrymander" and that these issues of fact would have to be tried if our court were to reverse the main holdings above referred to. Since affirmance by us would completely remove from the statute books the whole of the four 1964 plans and since an entirely new districting statute would be necessary, we think it inappropriate to pass any comment on these statements in the Special Term order and opinion.

The order should be affirmed, without costs.

CONCURRING OPINION PER BERGAN, J.

BERGAN, J. (concurring) The decision at Special Term holding the Assembly may not be enlarged beyond 150 members by legislative enactment must be affirmed. But the limitation of the New York Constitution on legislative power to reapportion districts goes well beyond a mere numerical change in the Assembly districts.

There are other constitutional requirements of equally uncompromising specificity. It is provided, e.g., that each county "shall always be entitled to one member of assembly"; that apportionment of more than one Assembly district within a county shall be by the local legislative body; that no county shall be divided in the formation of a Senate district unless there are two or more Senate districts in the county (N. Y. Const., art. III, §§ 4, 5).

The Legislature owes its existence to the Constitution. All of its powers, and the limitations on its powers, spring from it. No residual power to make structural changes in its own organization or in other branches of the govern-

ment set up by the Constitution is vested in the Legislature. These basic structures may be altered only by the approval of the people (art. XIX, § 1).

The fact that the Federal Government has now declared that the New York Constitution is invalid as in conflict with the United States Constitution in the way it apportions the Legislature does not create a new kind of ultra-constitutional power to establish a different basic pattern of representation. The people of New York retain the sole power to do this, and it has not been vested by them in the Legislature even to meet an emergency created by the Federal decisions.

The view expressed in the opinion in *Reynolds* v. *Sims* (377 U. S. 533, 586) that legislative reapportionment is "primarily" a matter "for legislative consideration and determination" adds nothing affirmative to the State powers distributed and controlled by constitutional language. Nor does the doctrine of construction by which we should save a clearly separate or separable item in a Constitution or a statute (*People ex rel. Alpha Portland Cement Co.* v. *Knapp,* 230 N. Y. 48, 60-63) create a power which is not there.

The theory on which the court now assumes that the Legislature may pass an apportionment statute inconsistent with the Constitution is that those restrictive constitutional portions have been held invalid by the Supreme Court and that this vacuum in some manner vests affirmative power in the Legislature to make different arrangements of apportionment. The assumption runs against the long history and tradition of federalism in the United States.

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To say that New York, one of the States which formed the Federal Government itself, is to derive a power over the reconstruction of its own government from the intimations of the judicial branch of the Federal Government as to what powers its Legislature ought to have is both revolutionary doctrine and a constitutional anachronism.

We must, of course, yield to the weight of Federal power holding portions of our Constitution invalid. But power to establish substitutes in the structure of the New York government rests only in the people of New York by constitutional revision with whatever risk this implies that if the time necessary to revise the Constitution moves too slowly in the judgment of the Federal court that court will affirmatively implement its decision.

If, as this court is now holding, the Legislature cannot increase the number of Assembly districts beyond 150 because the Constitution expressly states this number, it is reasonable to think that it has no power, either, to overrun other constitutional limitations expressed with equal solemnity.

DISSENTING OPINION PER VAN VOORHIS, J.

VAN VOORHIS, J. (dissenting). Executing the mandate of the United States Supreme Court in *WMCA* v. *Lomenzo* (377 U. S. 633), the three-Judge District Court decreed July 27, 1964: "The scheme of legislative apportionment of the State of New York is hereby declared to be unconstitutional and void as being in conflict with the XIV Amendment of the Constitution of the United States".

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It seems to me to be too clear for argument that an "Assembly" consisting of 150 members was an inseparable part of the "scheme of legislative apportionment" which was thus struck down. This scheme of apportionment was established under subdivision 5 of article III of the State Constitution of 1894 by dividing the whole number of citizen inhabitants of the State by the number of members of the Assembly, viz., the number 150 fixed by subdivision 2. The language of subdivision 5 of article III, in the case of the Assembly, as of subdivision 3, for the Senate, demonstrates, even if it had already not been made certain by the Constitutional Convention,* that the number of 150 was selected as a necessary factor in the constitutional formula which was devised to maintain up-State supremacy. The petitioner and the petitioners-respondents would be the last to deny that rural ascendency was uppermost in the minds of the delegates who recommended the State Constitution in 1894, and this is of the essence of what was held to violate the United States Constitution by the Supreme Court in *WMCA* v. *Lomenzo*. It is as certain as can be that an Assembly membership of 150 would not have

*The proponents of the new article III in the 1894 Convention affirmed that the basic purpose of increasing the size of the Assembly from 128 to 150 was to obtain a particular distribution of legislative seats between rural counties and urban centers (see, e.g., Mr. Becker, Revised Record, 1894 Constitutional Convention, Vol. 3, pp. 998, 999; Mr. Root, *ibid.*, p. 1211). Conversely, the opponents noted unequivocally their conclusion that the size chosen for the Houses of the Legislature were part and parcel of an over-all scheme to deprive urban centers of their rightful portion of legislative power (see, e.g., Mr. Bush, Vol. 3, p. 1008; Mr. Osborn, *ibid.*, p. 1038; Mr. Speer, *ibid.*, p. 1091; Mr. W. Sullivan, *ibid.*, 1102, 1103; Mr. Bowers, *ibid.*, pp. 1134, 1137; Mr. Nicoll, Vol. 4, pp. 14, 15).

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been adopted except in conjunction with the ratio for apportionment in accordance with which the Assemblymen were distributed throughout the State. In determining how much of a statute falls in the face of unconstitutionality the rule is that "a provision inherently unobjectionable, cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it *and that the legislature intended the provision to stand, in case others included in the act and held bad should fall.*" (*Dorchy* v. *Kansas,* 264 U. S. 286, 290, per BRANDEIS, J. [italics supplied]; *Lynch* v. *United States,* 292 U. S. 571, 586.) The New York State rule is the same as held in the numerous New York decisions cited in McKinney's Consolidated Laws of New York (Book 2, pt. 1, Constitutional Interpretation, § 48, pp. 42-45).

The same principle applies where a State Constitution conflicts with the United States Constitution.

There being 62 counties in the State, and one Assemblyman allocated to each, it was necessary to have enough so that every county in the State could be represented, the number being set at 150 so that there would be enough left over (88, in fact) to save appearances but not so many as to jeopardize up-State control under a formula carefully devised to distribute them so as not to threaten dominance by the smaller counties. This formula was based on a "ratio for apportionment" which was to be "The quotient obtained by dividing the whole number of inhabitants of the state, excluding aliens, by the number of members of assembly" (i.e., the 150 mentioned in § 2), and it was then provided that one member of Assembly should be

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apportioned to every county (including Fulton and Hamilton as one) containing less than the ratio and one-half over, two members to every other county, and the remaining members to the counties having more than two ratios.

This is the formula which the Supreme Court struck down, and the root of the formula is the ratio of apportionment which is the quotient obtained by dividing the citizen inhabitants of the State by 150. The number 150 is, therefore, the heart of the "scheme of legislative apportionment" which the Supreme Court declared to be unconstitutional. It would be playing fast and loose with the facts to assume that the number of 150 was arrived at independently of the formula in order to fix the numerical membership of the Assembly without regard to how they were to be distributed between up-State and down-State or among the more populous and less populous counties. Without the apportionment formula it is clear that the number 150 would not have been prescribed which made possible compliance with the dominant traditional policy of assigning at least one Assemblyman to each county, however small, and apportioning the rest in the areas where control was designed to be located. The 1894 Constitutional Convention has been criticized for accomplishing that result. The argument carries little weight that the convention intended to set the number at 150 in order to focus control in the down-State counties and to deprive many of the rural counties of an Assemblyman, which is the thrust of the decision at Special Term. It could only have been on such an assumption that the decision below was placed, since only on that basis could it be held that the convention and the people

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would have made the size of the Assembly 150 without regard to the manner in which these Assemblymen were to be apportioned, except that the 150 were to be distributed by dividing the "counties into assembly districts as nearly equal in number of inhabitants, excluding aliens, as may be". It attributes an intention to the delegates to the 1894 Constitutional Convention and to the people which is entirely different from and, indeed, opposite to that which they manifestly entertained, to consider that this figure was selected and apportionment made apart from the "ratio for apportionment" which was the key to the whole thing.

The intention to render these portions of the State Constitution inseparable is, of course, to be ascertained from the Constitution and Convention of 1894, but there can be little doubt that the former membership frozen at 128 by the Constitution of 1821 was known to have had the effect of limiting representation of the more populous counties nor, in my mind, is there any doubt that the number of 150 was adopted in 1894 with the same objective (See Ruth C. Silva: Apportionment of the New York Assembly, 31 Fordham L. R. 1-72, esp. pp. 2-13, esp. p. 5).

As late as January of 1965 the plaintiffs in the Federal court, who initiated the attack on New York's "scheme of legislative apportionment", conceded that the Legislature could change the size of the Assembly in order to correct the existing malapportionment. In the "Preliminary Memorandum in Support of Plaintiffs' Motion" filed in the District Court in January, 1965, they stated (pp. 14-15): "During the hearing last July, plaintiffs took the position that the provision governing the size of the Legislature

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was inseparably intertwined with the apportionment provisions which the Supreme Court had invalidated and that the Legislature is therefore free to alter the size of both houses * * *. We adhere to our prior position that a change in the size of the senate and assembly is permissible." This statement was still in the brief which they submitted to Special Term as *amici* in the proceedings under review.

The same rule applies in measuring the reach of the decision in *WMCA* v. *Lomenzo* (*supra*), regardless of whether it be a Federal or State question of law. It is appropriate to observe, however, that regardless of what deferential gestures the Supreme Court or the three-Judge District Court may have made to the State court, the State legislative apportionment formula has been struck down as conflicting with the Federal Constitution, and it is, therefore, a Federal question. Our State Constitution is invalid insofar as it conflicts with the Federal Constitution. It is true, as stated by the three-Judge District Court February 1, 1965, that all must fall together if the 150-member Assembly and other provisions of Article III "are inseparably intertwined with the 'constitutional formulas' condemned by the Supreme Court," but that cannot be a consequence of State law and is necessarily a consequence of Federal law. What the District Court evidently meant was that it may be a matter for the State courts to decide in the first instance how much of article III was stricken by the Supreme Court, and that it is for the States to revise their formulae in whatever manner they decide in conformity with the Supreme Court decision, but this cannot alter the circumstance that the State Constitution is invalid to the

extent that it conflicts with the Constitution of the United States. Whatever invalidity there be in it results from its conflict with the United States Constitution and, as in any other instances where a State statute or constitutional provision is claimed to conflict with the United States Constitution, it presents a Federal question and a Federal question alone whether such a conflict exists and the extent thereof. There cannot be a different law governing reapportionment depending upon whether it is done by the New York State Legislature or, in default thereof, by the Federal courts in compliance with the command that the United States shall guarantee to every State a republican form of government. In either event reapportionment must be accomplished in accordance with law, which means in conformity with the Constitution of the United States and any subsisting provisions of the State Constitution. The extent of the effect of the Federal Constitution, as interpreted by the Supreme Court, cannot present other than a Federal question.

The order appealed from should, in my view, be reversed.

Judges DYE, FULD, BURKE and SCILEPPI concur with Chief Judge DESMOND; Judge BERGAN concurs in result in a separate opinion; Judge VAN VOORHIS dissents and votes to reverse in an opinion.

Order affirmed.

Appendix A

Final Judgment ("Remititur") of the Court of Appeals of the State of New York Entered April 28, 1965

COURT OF APPEALS

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 14th day of April in the year of our Lord one thousand nine hundred and sixty-five, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND,
Chief Judge, Presiding.
RAYMOND J. CANNON, Clerk.

REMITTITUR ..... April 14, 1965

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Sup. Ct. 65

No. 140.

In the Matter of

the Petition of Jerome T. Orans,
Respondent-Appellant,

to

Review Chapters 976, & ors. of the Laws of 1964, apportioning and Districting the Senate and Assembly of the State of New York,
Nelson A. Rockefeller, Governor & ors., &c.,
Appellants-Respondents.

(and another proceeding).

BE IT REMEMBERED, That on the 30th day of March in the year of our Lord one thousand nine hundred and sixty-five, Nelson A. Rockefeller, Governor, & ors., &c., the appellants-respondents in the first proceeding, and Jerome T. Orans, the respondent-appellant in the first proceeding, and Nelson A. Rockefeller, Governor, & ors., &c., the appellants in the second proceeding, came here unto the Court of Appeals, by Louis J. Lefkowitz, Attorney General, and Justin N. Feldman, attorneys, and filed in the said Court Notices of Appeal and return thereto from the order of the Supreme Court, New York County.

And The Village Independent Democrats, & ors., the respondents in the second proceeding, afterwards appeared in said Court of Appeals by Stanley Sklar, their attorney.

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Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard these causes argued by Mr. Orrin G. Judd, of counsel for the appellants-respondents and appellants, and by Mr. Justin N. Feldman, of counsel for the respondent-appellant, and by Mr. Stanley Geller, of counsel for the respondents, and by Mr. Jack B. Weinstein, of counsel for the amicus curiae Nickerson, and after due deliberation had thereon, did order and adjudge that the order herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

/s/ RAYMOND J. CANNON
Clerk of the Court of Appeals
the State of New York.

Appendix A

Final Judgment ("Remittitur") of the Court of Appeals of the State of New York Entered April 28, 1965

COURT OF APPEALS, CLERK'S OFFICE,)
Albany, April 14, 1965.)

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said causes in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL]

/s/ RAYMOND J. CANNON
Clerk.

APPENDIX B

Constitutional Provisions Involved

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice Pres-

ident, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CONSTITUTION OF THE STATE OF NEW YORK

ARTICLE III—LEGISLATURE

§ 2. [*Number and terms of senators and assemblymen.*]

The senate shall consist of fifty members, except as hereinafter provided. The senators elected in the year one thousand eight hundred and ninety-five shall hold their offices for three years, and their successors shall be chosen

for two years. The assembly shall consist of one hundred and fifty members. The assemblymen elected in the year one thousand nine hundred and thirty-eight, and their successors, shall be chosen for two years. Amended by the people Nov. 2, 1937.

§ 3. [*Senate districts continued.*]

The senate districts described in section three of article three of this constitution as adopted by the people on November sixth, eighteen hundred ninety-four are hereby continued for all of the purposes of future reapportionments of senate districts pursuant to section four of this article. Added on approval by the people on Nov. 6, 1962, eff. Jan. 1, 1963.

§ 4. [*Readjustments and reapportionments; when federal census to control.*]

Except as herein otherwise provided, the federal census taken in the year nineteen hundred thirty and each federal census taken decennially thereafter shall be controlling as to the number of inhabitants in the state or any part thereof for the purposes of the apportionment of members of assembly and readjustment or alteration of senate and assembly districts next occurring, in so far as such census and the tabulation thereof purport to give the information necessary therefor. The legislature, by law, shall provide for the making and tabulation by state authorities of an enumeration of the inhabitants of the entire state to be used for such purposes, instead of a federal census, if the taking of a federal census in any tenth year from the year nineteen hundred thirty be omitted or if the federal census fails to

show the number of aliens or Indians not taxed. If a federal census, though giving the requisite information as to the state at large, fails to give the information as to any civil or territorial divisions which is required to be known for such purposes, the legislature, by law, shall provide for such an enumeration of the inhabitants of such parts of the state only as may be necessary, which shall supersede in part the federal census and be used in connection therewith for such purposes. The legislature, by law, may provide in its discretion for an enumeration by state authorities of the inhabitants of the state, to be used for such purposes, in place of a federal census, when the return of a decennial federal census is delayed so that it is not available at the beginning of the regular session of the legislature in the second year after the year nineteen hundred thirty or after any tenth year therefrom, or if an apportionment of members of assembly and readjustment or alteration of senate districts is not made at or before such a session. At the regular session in the year nineteen hundred thirty-two, and at the first regular session after the year nineteen hundred forty and after each tenth year therefrom the senate districts shall be readjusted or altered, but if, in any decade, counting from and including that which begins with the year nineteen hundred thirty-one, such a readjustment or alteration is not made at the time above prescribed, it shall be made at a subsequent session occurring not later than the sixth year of such decade, meaning not later than nineteen hundred thirty-six, nineteen hundred forty-six, nineteen hundred fifty-six, and so on; provided, however, that if such districts shall have been readjusted or altered by law in either of the years nineteen hundred thirty or nineteen hundred thirty-

one, they shall remain unaltered until the first regular session after the year nineteen hundred forty. Such districts shall be so readjusted or altered that each senate district shall contain as nearly as may be an equal number of inhabitants, excluding aliens, and be in as compact form as practicable, and shall remain unaltered until the first year of the next decade as above defined, and shall at all times consist of contiguous territory, and no county shall be divided in the formation of a senate district except to make two or more senate districts wholly in such county. No town, except a town having more than a full ratio of apportionment, and no block in a city inclosed by streets or public ways, shall be divided in the formation of senate districts; nor shall any district contain a greater excess in population over an adjoining district in the same county, than the population of a town or block therein adjoining such district. Counties, towns or blocks which, from their location, may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants, excluding aliens.

No county shall have four or more senators unless it shall have a full ratio for each senator. No county shall have more than one-third of all the senators; and no two counties or the territory thereof as now organized, which are adjoining counties, or which are separated only by public waters, shall have more than one-half of all the senators.

The ratio for apportioning senators shall always be obtained by dividing the number of inhabitants, excluding aliens, by fifty, and the senate shall always be composed of fifty members, except that if any county having three

or more senators at the time of any apportionment shall be entitled on such ratio to an additional senator or senators, such additional senator or senators shall be given to such county in addition to the fifty senators, and the whole number of senators shall be increased to that extent.

The senate districts, including the present ones, as existing immediately before the enactment of a law readjusting or altering the senate districts, shall continue to be the senate districts of the state until the expirations of the terms of the senators then in office, except for the purpose of an election of senators for full terms beginning at such expirations, and for the formation of assembly districts. Amended by vote of the people Nov. 3, 1931; amended and approved Nov. 6, 1945, eff. Jan. 1, 1946.

§ 5. [*Apportionment of assemblymen, creation of assembly districts.*]

The members of the assembly shall be chosen by single districts and shall be apportioned by the legislature at each regular session at which the senate districts are readjusted or altered, and by the same law, among the several counties of the state, as nearly as may be according to the number of their respective inhabitants, excluding aliens. Every county heretofore established and separately organized, except the county of Hamilton, shall always be entitled to one member of assembly, and no county shall hereafter be erected unless its population shall entitle it to a member. The county of Hamilton shall elect with the county of Fulton, until the population of the county of Hamilton shall, according to the ratio, entitle it to a member. But the